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**Datasheet for the decision
of 8 November 2013**

Case Number: T 0484/11 - 3.5.05

Application Number: 97931908.4

Publication Number: 917785

IPC: H04L12/64, H04M3/56, H04M3/00,
H04M3/50

Language of the proceedings: EN

Title of invention:
Processing device network

Patent Proprietor:
BRITISH TELECOMMUNICATIONS public limited company

Opponent:
Siemens Aktiengesellschaft

Headword:
Internet telephony/BT

Relevant legal provisions:
EPC 1973 Art. 54, 56
EPC R. 116(1)
RPBA Art. 12(4), 13(1)

Keyword:

Allowable disclaimer - main request (no)
Novelty - first auxiliary request (yes)
Inventive step - first auxiliary request (no)
Admission of second to fourth auxiliary requests - (no)
Correct exercise of first-instance discretionary power - (yes)
Request to revoke the patent - refused due to prohibition of
reformatio in peius

Decisions cited:

G 0009/92, G 0004/93, G 0007/93, G 0001/03, R 0016/09,
R 0001/13, T 1067/08, T 0028/10

Catchword:

See points 4.1, 5.1, and 6.1



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 0484/11 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 8 November 2013

Appellant: BRITISH TELECOMMUNICATIONS public limited
(Patent Proprietor) company
81 Newgate Street
London
EC1A 7AJ (GB)

Representative: Semos, Robert Ernest Vickers
BT Group Legal
Intellectual Property Department
PP C5A, BT Centre
81 Newgate Street
London
EC1A 7AJ (GB)

Respondent: Siemens Aktiengesellschaft
(Opponent) Wittelsbacherplatz 2
80333 München (DE)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
21 December 2010 maintaining European Patent
No. 917785 in amended form.

Composition of the Board:

Chair: A. Ritzka
Members: K. Bengi-Akyuerek
G. Weiss

Summary of Facts and Submissions

- I. The appeal of the patent proprietor is against the interlocutory decision of the opposition division, posted on 21 December 2010, to maintain European patent No. 917785 as amended according to the claims of a third auxiliary request, in view of the invoked opposition grounds of lack of novelty and inventive step (Article 100(a) EPC in conjunction with Articles 54 and 56 EPC). According to the decision under appeal, a main request (i.e. claims as granted) was rejected on the ground of lack of novelty (Article 54 EPC), a first and a second auxiliary request were not admitted by the opposition division into the first-instance proceedings under Rule 116(1) EPC, whereas a fourth auxiliary request was not considered by the opposition division as the third auxiliary request had already been found to be allowable.
- II. The following documents were *inter alia* cited in the opposition proceedings:
- E1: GB-A-2 282 506;
 - E2: JP-A-0 8032 618;
 - E2b: US-A-5 625 675 (post-published family member of the Japanese document E2 introduced into the opposition proceedings on 27 October 2010);
 - E4: D.C. Swinehart et al.: "Adding Voice to an Office Computer Network", Proceedings of IEEE Global Telecommunications Conference, San Diego, pp. 392-398, 1983.
- III. Notice of appeal was received on 28 February 2011. The appeal fee was paid on the same day. With the statement setting out the grounds of appeal, received on

2 May 2011, the appellant (patent proprietor) filed amended claims according to a main request and a first auxiliary request. It requested that the decision under appeal be amended or set aside and that the patent be maintained on the basis of the main request or the first auxiliary request, as submitted with the statement setting out the grounds of appeal, or the second auxiliary request, as filed at the oral proceedings before the opposition division. In addition, oral proceedings were requested as an auxiliary measure.

IV. With a response letter dated 21 November 2011, the respondent (opponent) requested that the patent be revoked in its entirety on the grounds of an unallowable disclaimer and lack of novelty (Article 54 EPC) in view of E2 with respect to the main request, on the grounds of lack of novelty and inventive step (Articles 54 and 56 EPC) in view of E2 with respect to the first auxiliary request, and on the ground of lack of inventive step (Article 56 EPC) in view of E2 combined with E1 as regards the second auxiliary request. Also, it requested oral proceedings as an auxiliary measure.

V. A summons to oral proceedings scheduled for 29 August 2013 was issued on 16 May 2013 and - upon receipt of a request for postponement by the appellant - the oral proceedings were re-scheduled to 8 November 2013. In an annex to this summons, the board gave its preliminary opinion on the appeal pursuant to Article 15(1) RPBA. In particular, observations were made with regard to the allowability of the disclaimer and the questions of novelty and inventive step (Articles 54 and 56 EPC 1973), in particular having

regard to E2 and E1.

- VI. By letter dated 8 October 2013, the appellant filed amended claims according to a second auxiliary request, a third auxiliary request, and a fourth auxiliary request, together with amended description pages, and submitted arguments in support of novelty and inventive step.
- VII. With a telefax of 6 November 2013, the respondent submitted counter-arguments with respect to all pending claim requests and filed a new document E5 as evidence of the skilled person's common general knowledge relating to the "Point-to-Point Protocol".
- VIII. Oral proceedings were held as scheduled on 8 November 2013, during which the respondent requested that a new document E6 be admitted into the appeal proceedings, as evidence of the skilled person's common general knowledge regarding "point-to-point connections". The admissibility and allowability of all pending claim requests were discussed.

The appellant's final request was that the decision under appeal be set aside and that the patent be maintained in amended form according to the main or first auxiliary request, filed with the statement setting out the grounds of appeal, or according to the second, third or fourth auxiliary request, filed with letter dated 8 October 2013.

The respondent's final request was that the patent be revoked.

At the end of the oral proceedings, the decision of the

board was announced.

IX. Claim 1 of the **main request** reads as follows:

"A method of conducting an Internet telephone service using packetized telephone frequency signals over an addressed packet-based data communication network (309; 400; 504; 806) between data processing devices (302 to 307; 410, 420; 800, 802 to 805) connected to the network, the processing devices being arranged to conduct the Internet telephone service directly between themselves and either having a user interface or being a gateway server giving access to remote communication devices, the method being characterised by:

a set-up phase in which
a source processing device (410) sends to a communications exchange apparatus (300) also connected to the communication network (400) a set-up signalling packet (706) identifying a destination processing device (420) with which it is desired to conduct the Internet telephone service, and
the communications exchange apparatus (300) responds to receipt of the set-up signalling packet (706) by determining the network address of the identified destination processing device and communicating (720) the network address of the identified destination processing device to the source processing device; and
a subsequent phase in which
the source processing device (410) and the destination processing device (420) send packetized telephone frequency signals of the Internet telephone service directly between themselves over the communication network (400), the source

processing device (410) using the network address communicated (720) from the communications exchange apparatus (300) during the set-up phase disclaiming the case where the communication network is an Ethernet Local Area Network."

Claim 1 of the **first auxiliary request** comprises all the features of claim 1 of the main request except for the disclaimer and adds that the packetised telephone frequency signals are "sent via a point-to-point protocol, PPP, connection".

Claim 1 of the **second auxiliary request** reads as follows (amendments to the main request marked by the board):

"A method of conducting an Internet telephone service using packetized telephone frequency signals over an addressed packet-based data communication network (309; 400; 504; 806) between a source data processing devices (302 to 307; 410, 420; 800, 802 to 805) and a destination processing device connected to the network, the processing devices being arranged to conduct the Internet telephone service directly between themselves using a point-to-point protocol via an Internet gateway server which encapsulates packetized telephone frequency signals received from the source processing device in Internet Protocol signal headers and transmits them over the Internet to the destination processing device, and the processing devices either having a user interface or being a gateway server giving access to remote communication devices, the method being characterised by:

a set-up phase in which

the source processing device sends to a communications exchange apparatus (300) also

connected to the communication network (400) a set-up signalling packet (706) identifying the destination processing device with which it is desired to conduct the Internet telephone service, and the communications exchange apparatus (300) responds to receipt of the set-up signalling packet (706) by determining the network address of the identified destination processing device and communicating (720) the network address of the identified destination processing device to the source processing device; and a subsequent phase in which the source processing device (410) and the destination processing device send packetized telephone frequency signals of the Internet telephone service directly between themselves over the communication network (400), the source processing device (410) using the network address communicated (720) from the communications exchange apparatus (300, 807, 808) during the set-up phase."

Claim 1 of the **third auxiliary request** comprises all the features of claim 1 of the main request except for the disclaimer and further adds that

"the communications exchange apparatus (300) comprises a call control apparatus and a switch apparatus which are separated from one another and communication between the switch apparatus and the call control apparatus is by means of control signals such as to allow interchangeability of the call control apparatus".

Claim 1 of the **fourth auxiliary request** comprises all the features of claim 1 of the main request except for

the disclaimer and adds that the packetised telephone frequency signals are "sent via point-to-point connections" and the feature of

"responding to receipt of a conference request in respect of a set of the processing devices, each of the processing devices of the set conducting respective audio telephony directly between itself and another of the processing devices of the set, for establishing a conference between the processing devices of the set by directing each of the processing devices of the set to cease conducting its respective audio telephony and to conduct audio telephony directly between itself and the communications exchange apparatus, and acting as a conference bridge with respect to packets received from the processing devices of the set".

Reasons for the Decision

1. The appeal is admissible.
2. MAIN REQUEST

This request differs from the rejected main request underlying the appealed decision (i.e. claims as granted) *inter alia* in that claim 1 as amended

A) disclaims the case where the communication network is an Ethernet Local Area Network (LAN).

2.1 *Allowability of the disclaimer*

- 2.1.1 The respondent argued that disclaimer A) was not supported by the application as filed, since it disclosed specifically the use of an Ethernet LAN and was also inadmissible according to the criteria

established by the Enlarged Board of Appeal in decisions G 1/03 and G 2/10.

2.1.2 The appellant contended that the implementation of the present invention within an Ethernet LAN according to the original application was for illustration purposes only and that the disclaimer established novelty of the subject-matter of claim 1 over the accidental anticipation E2. More specifically, E2 disclosed a local area network without specifying its implementation. However, the figures in E2 disclosed implementations which looked like Ethernet LANs. Moreover, at the priority date of the patent in suit the Ethernet LAN was the typical implementation of a LAN. Although further implementations were available, they were purely academic. Thus, E2 implicitly disclosed an Ethernet LAN. However, such a disclosure constituted an accidental anticipation as E2 dealt with a LAN-based voice mail system using a bus network whereas the claimed subject-matter was directed to an Internet telephone service provided between multiple networks which were connected over the Internet. Therefore, E2 was not an appropriate starting point for an inventive-step argumentation and had to be regarded as an accidental anticipation.

2.1.3 It was common ground at the oral proceedings that disclaimer A) is to be regarded as an "undisclosed disclaimer" and that therefore its allowability was subject to the criteria determined in G 1/03 (cf. G 1/03, OJ EPO 2004, 413, Order No. 1). One of the conditions a disclaimer has to fulfil to be allowable according to G 1/03 is to "restore novelty by delimiting a claim against an accidental anticipation under Article 54(2) EPC" where "an anticipation is accidental if it is so unrelated to and remote from the

claimed invention that the person skilled in the art would never have taken it into consideration when making the invention".

The board finds that, firstly, E2 does not constitute an accidental anticipation under Article 54(2) EPC 1973, because E2 is directed to the same technical field (i.e. packet-based telephony communications via a LAN) and functional concept (i.e. retrieving the destination's address from a central unit before setting up a direct connection between a source device and the destination device) as the present invention. Secondly, the board agrees with the respondent that disclaimer A) does not restore novelty by delimiting claim 1 against E2, since E2 is related to a general LAN without any further details as to its technical implementation (see e.g. E2b, column 5, lines 8-16) while the term "Ethernet" is not mentioned at all throughout the whole disclosure of E2. It is also true that at the patent's priority date different, well-known LAN protocols could equally have been considered by the skilled person, such as Token Ring LANs. Hence, the board holds that the use of LANs based on the Ethernet technology is neither explicitly nor implicitly disclosed in E2 and that therefore the disclaimer would not restore novelty of claim 1 over E2.

2.2 For the above reasons, disclaimer A) is not considered allowable and thus the main request is not allowable either.

3. FIRST AUXILIARY REQUEST

This request is based on the non-admitted first auxiliary request considered in the appealed decision

and differs from the claim set as granted *inter alia* in that claim 1 as amended further specifies that

B) the telephony frequency signals are sent via a PPP connection.

Feature B) is taken from the description (cf. page 15, lines 19-23 of the application as filed).

3.1 Article 52(1) EPC: Novelty and inventive step

3.1.1 The appellant conceded at the oral proceedings before the board that E2 disclosed all the features of claim 1 except for feature B), i.e. using PPP connections between the data processing devices. Furthermore, the appellant submitted that the effect resulting from feature B) consisted in traversing multiple Internet-type networks or "inter-networks", as the PPP technology was typically used for Internet-based networks rather than for local area networks such as Ethernet LANs. Therefore, despite the fact that the PPP technology in itself was generally well-known to the skilled person at the patent's priority date and even though claim 1 recited only a single "data communication network" (rather than multiple networks) over which the telephone signals are sent, the use of the PPP scheme in a LAN-based network rendered the subject-matter of claim 1 inventive over the teaching of E2. This use further implied that the underlying data communication network corresponded to multiple networks.

3.1.2 Even though E2 - at least implicitly - teaches the use of point-to-point connections (see e.g. E2b, column 5, lines 48-54 and column 8, lines 39-43), the board agrees with the appellant that the use of the specific Point-to-Point Protocol (PPP) is not directly and

unambiguously derivable from E2. Accordingly, the subject-matter of claim 1 is found to be novel over E2 (Article 54 EPC 1973).

3.1.3 As to inventive step, the board considers that the skilled person in the field of telecommunications faced with the problem of extending the LAN-based voice communication system also to Internet-based communications and starting from E2 would look for a viable protocol enabling access to Internet-based networks. From his common general knowledge he would be aware that the well-established Point-to-Point Protocol is commonly used for providing access for an Internet user to an Internet service provider at the second OSI layer. Therefore, the board sees no reason why the person skilled in the art would not apply, as first choice, the PPP technology for enabling packet-switched data transfers between a local area network and an Internet-style network.

3.1.4 From the above it follows that the subject-matter of claim 1 of this request does not involve an inventive step having regard to E2 and the skilled person's common general knowledge. In this respect, it was also not necessary for the board to decide on the admissibility of late-filed documents E5 and E6 submitted by the respondent as evidence with regard to "Point-to-Point Protocol" and "point-to-point connections" (cf. points VII and VIII).

3.2 In conclusion, this request is not allowable under Article 56 EPC 1973.

4. SECOND AUXILIARY REQUEST

This request differs from the rejected main request

underlying the appealed decision (i.e. claims as granted) *inter alia* in that claim 1 as amended further adds that

C) the data processing devices are a source data processing device and a destination data processing device (emphasis added);

D) the Internet telephone service is conducted directly between the data processing devices using a point-to-point protocol via an Internet gateway server which encapsulates packetised telephone frequency signals received from the source processing device in Internet Protocol signal headers and transmits them over the Internet to the destination processing device.

Features C) and D) are taken from the description (cf. page 15, lines 19-23 and page 22, lines 7-9 of the application as filed).

4.1 *Admission into the appeal proceedings*

The board has decided not to admit this request into the appeal proceedings, for the following reasons:

4.1.1 The present request was filed for the first time in response to the summons to oral proceedings before the board (cf. point VI above). Hence, it was filed at a relatively late stage of the appeal proceedings. The admissibility of requests filed at such a late stage is subject to Article 13 RPBA.

4.1.2 According to Article 13(1) RPBA, a board's discretion in admitting any amendment to a party's case after it has filed its grounds of appeal or reply "shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the

proceedings and the need for procedural economy". In this regard, the criteria set out in Article 13(1) RPBA are to be regarded as exemplary and not cumulative such that other considerations and well-established criteria relevant to the admissibility issue (e.g. the question whether a request is likely to overcome the objections in response to which it has been filed or whether it is clearly allowable) can also be taken into account (see e.g. R 16/09 of 19 May 2010, point 2.2.4; R 1/13 of 17 June 2013, point 16.2).

4.1.3 The appellant submitted that the amendments according to features C) and D) were minor amendments building on the functionality defined by the previous claims and had been made to clarify that the Internet telephone service operated over an inter-network rather than over a single LAN.

4.1.4 However, the board agrees with the respondent that those amendments are related to major aspects of the present invention which had never been discussed or examined before in the examination and opposition proceedings. Accordingly, the board considers that the admission of this request into the appeal proceedings at such a late stage would in fact make further substantial investigations and/or a remittal to the department of first instance necessary. That, however, would run counter to the principle of *procedural economy*.

In addition, added features C) and D) are obviously associated with the second embodiment, related to telephone communications via a LAN and the Internet, according to the application as filed (see page 20, line 27 to page 24, line 2 in conjunction with Fig. 15), whereas claim 1 as granted was directed to

the first embodiment related to telephone communications within a LAN (see page 16, line 12 to page 20, line 26 in conjunction with Figs. 13 and 14). Therefore, they are found to be substantial - rather than minor - amendments which would add *complexity* to the assessment of novelty and inventive step.

4.2 In view of the above, this request was not admitted by the board into the appeal proceedings in the exercise of its discretionary power under Article 13(1) RPBA.

5. THIRD AUXILIARY REQUEST

This request differs from the rejected main request underlying the appealed decision (i.e. claims as granted) *inter alia* in that claim 1 as amended further recites that

E) the communications exchange apparatus comprises a call control apparatus and a switch apparatus which are separated from one another and communication between the switch apparatus and the call control apparatus is by means of control signals such as to allow interchangeability of the call control apparatus.

Feature E) arises from the description (cf. page 15, lines 19-23 and page 22, lines 7-9 of the application as filed).

5.1 *Admission into the appeal proceedings*

The board has decided not to admit this request into the appeal proceedings either, the reasons being as follows:

- 5.1.1 This request was filed for the first time in response to the summons to oral proceedings before the board (cf. point VI above), i.e. at a relatively late stage of the proceedings. Hence, its admissibility is subject to Article 13 RPBA.
- 5.1.2 The amendment according to feature E) was allegedly made by the appellant to further distinguish the underlying subject-matter from the cited prior art and was purportedly related to a minor and alternative implementation of the claimed method. According to the application, the technical effect of that feature consisted in providing interchangeability of different call control apparatuses having different functions on a single switch apparatus (cf. page 24, lines 3-10 of the application as filed).
- 5.1.3 Again, the board concurs with the respondent that those amendments are related to aspects of the present invention, namely to additional structural details of the communications exchange apparatus, which had never been discussed or examined before in the course of the examination and opposition proceedings. Therefore, admitting the present request at such a late stage of the procedure would likewise militate against the principle of *procedural economy*.

Moreover, it is apparent to the board that feature E) would not render claim 1 of this request *clearly allowable* under Article 56 EPC 1973, since E2 *prima facie* discloses a computer 2A (corresponding to the "communications exchange apparatus") including separate sub-components such as a directory server 23 and a LAN interface 28 (see E2b, Fig. 1) which may be read onto the "call control apparatus" and "switch apparatus" as

claimed, respectively.

5.2 Accordingly, the board also declined to admit this request into the appeal proceedings under Article 13(1) RPBA.

6. FOURTH AUXILIARY REQUEST

This request corresponds to the non-admitted second auxiliary request underlying the appealed decision and differs from the claim set as granted *inter alia* in that claim 1 as amended further specifies that

- F) the telephony frequency signals are sent via point-to-point connections;
- G) for establishing a conference between processing devices of a set conducting respective audio telephony directly between itself and another of the processing devices of the set, each of the processing devices of the set is directed to cease conducting its respective audio telephony and to conduct audio telephony directly between itself and the communications exchange apparatus, and the communications exchange apparatus acts as a conference bridge with respect to packets received from the processing devices of the set, in response to receipt of a conference request in respect of the set of processing devices.

Feature F) is taken from the description (cf. page 15, lines 19-23 of the application as filed), while feature G) arises from the claims (cf. claims 14 and 23 as granted).

6.1 *Admission into the appeal proceedings*

The board has decided not to admit this request into

the appeal proceedings, for the following reasons:

- 6.1.1 The claims of the present request were filed with the statement setting out the grounds of appeal and, apart from shifting the clause "characterised by" within the independent claims, correspond to the claims of the second auxiliary request, filed during the oral proceedings before the opposition division, which were not admitted into the first-instance proceedings (cf. point I above). Generally, the admissibility of requests which were not admitted in the first-instance proceedings is subject to Article 12(4) RPBA in the appeal proceedings. Pursuant to Article 12(4) RPBA, in the appeal proceedings, a board has the discretionary power "to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first instance proceedings".
- 6.1.2 As to the admissibility of this request, the appellant argued that the amendments related to features F) and G) were made to further distinguish the underlying subject-matter from E2 and E4 and contended that the opposition division had not admitted the second auxiliary request, filed during the oral proceedings before it, into the first-instance proceedings because overly complicated arguments as to novelty and inventive step had been exchanged between the parties at the oral proceedings before the opposition division.
- 6.1.3 In principle, to decide under Article 12(4) RPBA on the admissibility of a request which was not admitted by the department of first instance, the board only needs to determine whether the first-instance department correctly exercised its discretionary power in not admitting the request under consideration (cf. T 1067/08, point 7; T 28/10, point 2). In doing so,

according to the established case law of the Enlarged Board of Appeal, it is not the function of a board to review all the facts and circumstances of the case as if it were in the place of the first-instance department, in order to decide whether or not it would have exercised such discretion in the same way as the first-instance department. Rather, a board should only overrule the way in which a first-instance department has exercised its discretion if it comes to the conclusion either that the first-instance department in its decision has not exercised its discretion in accordance with the right principles, or that it has exercised its discretion in an unreasonable way, and has thus exceeded the proper limits of its discretion (cf. G 7/93, OJ EPO 1994, 775, point 2.6).

- 6.1.4 In the present case, the opposition division did not admit the then second auxiliary request into the opposition proceedings under Rule 116(1) EPC, since it was found to be late-filed and claim 1 of the request was held to be *prima facie* not allowable under Article 56 EPC in view of E2 and E1 (cf. appealed decision, section 4.1.1). More specifically, according to the decision under appeal, the request was considered late-filed since it had been submitted during the first-instance oral proceedings and thus after the date specified in accordance with Rule 116(1) EPC in the summons. Furthermore, the opposition division held that the amendments made related to the addition of the features of claim 14 as granted to claim 1 and that they *prima facie* did not establish an inventive step, because E1 disclosed a "conference bridge" in the same way as the patent in suit and it was common general knowledge to use such a conference bridge for reducing the number of point-to-point

connections.

6.1.5 The board therefore holds that the opposition division exercised its discretion on the basis of the relevant facts (i.e. late-filed request involving amendments taken from claim 14 as granted), according to the right principle (i.e. criterion of "*prima-facie* allowability"), and in a reasonable way (i.e. by providing a conclusive reasoning for its discretionary decision). Therefore, the board sees no reason to overrule the way in which the opposition division exercised its discretion in the present case.

6.2 In view of the above, the board did not admit this request into the appeal proceedings, in the exercise of its discretionary power under Article 12(4) RPBA.

7. *Respondent's request to revoke the patent*

7.1 The respondent requested that the patent be revoked in its entirety on the grounds that also claims 1 and 6 as maintained by the opposition division (according to the third auxiliary request underlying the appealed decision) lacked an inventive step in view of the combined teaching of E4 and E3 (cf. respondent's reply to the summons dated 6 November 2013, page 4). This request was maintained at the oral proceedings before the board (cf. point VIII above).

7.2 However, in the present case, only the patent proprietor lodged an admissible appeal, in which it requested that the interlocutory decision be set aside. The opponent chose not to file an appeal, but has the status of a party to the appeal proceedings as of right in accordance with Article 107, second sentence, EPC. In accordance with G 9/92, OJ EPO 1994, 875, points 11

and 14, and G 4/93 of 14 July 1994, a non-appealing opponent is limited to defending the result of the appealed decision, i.e. pleading to confirm the maintenance in amended form of the patent in suit as decided by the opposition division through the dismissal of the proprietor's appeal. It can thus no longer request revocation of the patent, as it could in the preceding opposition proceedings, once the time limit for appeal has expired. Therefore, according to the above decisions of the Enlarged Board of Appeal, the respondent may not challenge the maintenance of the patent as amended in accordance with the interlocutory decision, nor does the board see any reason to deviate from those decisions.

- 7.3 Consequently, the respondent's request that the patent be revoked in its entirety is considered inadmissible.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



K. Götz

A. Ritzka

Decision electronically authenticated